Supreme Court, U.S.
FILED

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CASE NO._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN HUBERT MOLL,

PETITIONER,

vs.

THE STATE OF FLORIDA

RESPONDENT.

On Petition for Certiorari Pursuant to 28 U.S.C. § 1254(1)

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

Ellis Rexwood Curry IV
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(813) 238-5371 FBN# 0475327
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Whether the Court should grant certiorari to examine whether Petitioner's Free Speech Constitutional Rights were violated by the Brevard County (Florida) Public Nudity Ordinance 95-21 and by the failure to find that Petitioner qualified under exemptions that specifically allow protected-as-speech nudity under the ordinance, and that Petitioner complied with the ordinance and did not "knowingly and intentionally" appear illegally nude in a public place?

PARTIES IN THE COURT BELOW

Petitioner, John Hubert Moll was the defendant in the trial court and was the Defendant-Appellant in the Fifth District Court of Appeal for the State of Florida. The Respondent, The State of Florida was the Plaintiff and was the Plaintiff-Appellee in the Fifth District Court of Appeal for the State of Florida.

RULE 29.1 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

The Petitioner, John Hubert Moll, respectfully prays that a writ of Certiorari issue to review the judgment of the FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA entered herein.

OPINIONS BELOW

(A) A copy of the non-published opinion dated December 12, 1997 of the Fifth Circuit Court of Appeals for the State of Florida and affirming the finding of guilt of Petitioner is joined as Appendix "A".

(B) A copy of the orally transcribed trial court opinion finding Petitioner guilty is joined as Appendix "B".

(C) A copy of the non-published opinion of the Circuit Court acting in its appellate capacity and denying Petitioner's direct appeal is joined as Appendix "C".

(D) A copy of the non-published order dated February 9, 1998 and denying Petitioner's Motion for rehearing, for rehearing en banc or the certify question is joined as Appendix "D".

(E) A copy of the Brevard County (Florida) Public Nudity Ordinance 95-21 is joined as Appendix "E".

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1) and Howelett v. Rose, 496 U.S. 356, 110 Sup.ct. 2430, 110 L.Ed.2d 332 (1990). The Fifth District Court of Appeal in Florida entered its denial of Petitioner's Petition for Certiorari review of the Decision of the Circuit

Court For Brevard County, acting in its Appellate Capacity, affirming the conviction and sentence of petitioner.

STATUTORY PROVISIONS INVOLVED

The Ordinance under which petitioner was convicted and sentenced, the "Brevard County Public Nudity Ordinance", is attached as Exhibit B, and it provides in relevant part that:

Section 3. u. provides as follows:

> "the exemptions contained in this ordinance provide adequate protection to the persons who, without such exemptions, might be prevented or discouraged by this, ordinance from exercising constitutionally protected rights; and...".

Section 4. Definitions. b. provides as follows:

> "'Nude' means to openly display or expose, the human male or female genitals or pubic area with less than a fully opaque covering; or...."

Section 6. Exemptions. Provides as follows:

> "The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:
>
> b. when the conduct of being nude cannot constitutionally be prohibited by this

ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., _ U.S. 111 S.Ct 2456, 115 L. Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So . 2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or... "

STATEMENT OF THE CASE

On May 18, 1995 the Brevard County board of County Commissioners adopted an ordinance with the title "Brevard County Public Nudity Ordinance" which included certain exemptions listed in section (6) and contained in a definition of "Nude" provided in the ordinance (see excerpts supra, and the ordinance attached as exhibit B).

On April 14, 1996 Petitioner was at a public beach in Brevard County wearing an expressive outfit of his own choice which included a "Vote for Clinton/Gore '96" sign. It is that message that Petitioner intended to communicate to viewers.

Viewers of Petitioner included members of the Brevard County Sheriff's Department who proceeded to

arrest and charge petitioner with violating the aforesaid nudity ordinance.

On May 14, 1996 Petitioner filed a Motion to Dismiss under Florida Rules of Criminal Procedure 3.190(c)(4). This motion was heard considered and denied by the Honorable Kenneth Friedland on July 5, 1996.

Petitioner's trial occurred on July 18, 1996 at which the state produced no evidence that he did anything that would have removed the protection afforded him by the ordinance's exemptions when proclaiming "Vote for Clinton and Gore" by sign and other political statements.

At the close of the government's case on July 18, 1996, the Court Acquitted petitioner under Florida Statute § 877.03. Indeed, the government stipulated it was withdrawing the Florida Statute § 877.03 allegation.

At the close of all evidence, Petitioner made a motion for judgment of acquittal and renewed all previous motions which were denied.

The Petitioner was found guilty and sentenced to 6 months probation and ordered to pay cost of investigation and a $50.00 fine.

Appeal was pursued and the conviction was affirmed by the Circuit Court for Brevard County acting in its appellate capacity on July 30, 1997.

A Petition for Certiorari review of the Decision of the Circuit Court For Brevard County, acting in its Appellate Capacity was denied by Fifth district Court of appeal for the State of Florida on December 12, 1997.

Petitioner's "motion for rehearing, for rehearing en banc or to certify question" was denied by the Fifth District Court of Appeal for the State of Florida on February 9, 1998.

This Petition for writ of certiorari to the United States Supreme Court followed.

REASONS FOR GRANTING THE WRIT
ARGUMENT: THE NUDITY ORDINANCE IS UNCONSTITUTIONAL AS APPLIED

The Court should grant certiorari to examine whether Petitioner's constitutional rights were violated by the Brevard County (Florida) Public Nudity Ordinance 95-21 and by the failure to find that Petitioner qualified under exemptions that specifically allow nudity under the ordinance, and that Petitioner complied with the ordinance and did not "knowingly and intentionally" appear illegally nude in a public place.

It is here urged that the Brevard County Ordinance 95-21 is unconstitutional as applied in a criminal action against non-commercial political speech that is not lewd or disorderly, and specifically that speech/nudity combination engaged in by the petitioner.

Petitioner respectfully submits that the Fifth District Court of Appeal for Florida overlooked or misapprehended significant controlling points of law. The Court's opinion cites only two cases, Barnes v. Glen Theatre, Inc., 501 U. S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and Cafe 207, Inc. v. St. Johns County, 856, F. Supp. 641 (M.D. Fla. 1994), *affirmed*, 66 F. 3d 272 (11th Cir. 1995), *cert. denied*, ___ U. S. ___, 116 S. Ct. 1544, 134 L. Ed. 2d 647 (1996).

Both cases that the Court cites, Cafe 207 and Barnes, were cases involving commercial activity on or about a business and civil actions for declaratory and injunctive relief. In Petitioner Moll's case there was involved serious political speech, (i.e. "Vote for Clinton/Gore 1996," etc) and no commercial speech and Moll's case involved incarcerative action by the government against Petitioner Moll's protected speech at a public forum, and Moll intentionally availed himself of specific sections of the ordinance at issue that permit incidental public nudity and serious political speech such as Petitioner Moll combined, quite unlike the cases cited

in the lower court's opinion. It is important to distinguish Petitioner Moll's case in that Petitioner Moll was engaged in the purest form of Free Speech and that it was Political Speech, and Moll was not engaged in any commercial activity.

In addition, the Court's ruling as it now stands would conflict with the rulings of the United States Supreme Court and the Florida Supreme Court, which clearly articulated that Political Speech is protected by the Free Speech clause of the First Amendment to the United States Constitution and that nudity alone does not remove that protection. Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981). McGuire v. State, 489 So. 2d 729, (Fla. 1986).

Petitioner seeks reversal of his conviction as was ordered in another case involving a common law writ of certiorari, Goodmakers v. State, 450 So.2d 888 (Fla. 2d DCA 1984).

Petitioner qualified under the exemptions provided by the ordinance, especially 6(c) and he believed he qualified under that exemption, and otherwise did not "knowingly and intentionally" appear illegally nude in a public place, and that the ordinance would otherwise be unconstitutional as applied if Petitioner were not exempt under the ordinance.

The Brevard County Public Nudity Ordinance contains exemptions under 6(b) for expressive conduct and under 6(c) for nudity associated with some mode of expression which itself is entitled to First Amendment protection consistent with Schad and McGuire v. State, 489 So. 2d 729, (1986).

Petitioner maintains that at all times by facts and law, he was entitled to at least one of the exemptions, particularly 6(b) and/or 6(c), arguably both, since they are not mutually exclusive.

In addition, it is petitioner's argument that his conduct was constitutionally protected, and that the ordinance is unconstitutional as applied if it proscribed petitioner's conduct.

In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the United States Supreme Court declared unconstitutional a Jacksonville, Florida ordinance making the showing of nudity in drive-in movies a criminal offense. Holding the ordinance overbroad, the Court said such a ban would cover a nude baby on a bear rug. In dissenting, Justices White, Burger and Rehnquist stated that the majority view would permit actual nudity in public places on the theory that those offended "may merely look the other way."

Cafe 207, Inc. v. St. Johns County, 856 F. Supp 641 (M.D. Fla. 1994) appears to support the petitioner. It is also distinguishable. In that case the Court upheld the constitutionality of a similar ordinance containing similar exemptions. However, that was a civil injunctive relief case involving commercial speech. A distinction should be made between civil injunctive relief cases involving commercial speech and criminal cases involving non-commercial free speech of the type that petitioner was engaged.

The United States Supreme Court more than fifteen years ago clearly articulated that political speech is protected by the Free Speech clause of the First Amendment to the United States Constitution and that nudity alone does not remove that protection. The case was Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981).

The Florida Supreme Court more than ten years ago said in clear and unambiguous language when nudity is protected as speech. McGuire v. State, 489 So. 2d 729, (1986), "Nudity is protected as Speech...".

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner John Hubert Moll respectfully submits that the petition for writ of certiorari should be granted.

The evidence at trial confirmed that Petitioner was engaged in a protected mode of expression under the protection of the Free Speech clause of the Florida and United States Constitution and by existing Judicial decisions. His mere nudity did not remove such protection at a public forum. Schad is controlling. His conviction should be reversed.

Respectfully submitted,

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Attorney for Petitioner
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(813) 238-5371 Bar #0475327

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1997

JOHN HUBERT MOLL, III,
Petitioner,

v. Case No. 97-2395

STATE OF FLORIDA,
Respondent.
----------/

Opinion filed December 12, 1997

Petition for Certiorari Review of Decision
from the Circuit Court for Brevard County,
Acting in its Appellate Capacity.

Ellis Rexwood Curry, IV., Tampa, for Petitioner.

No appearance for Respondent.

PER CURIAM.

DENIED. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and Cafe 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), affirmed, 66 F. 3d 272 (11th Cir. 1995), cert. denied, ___ U. S. ___, 116 S. Ct. 1544, 134 L. Ed. 2d 647 (1996).

DAUKSCH, SHARP, W., and PETERSON, JJ., concur.

APPENDIX B

THE COURT: Well, you know, I do find that the County ordinance did not in anyway attempt to prohibit his freedom of speech. No one is telling him he can't wear is arm band. No one is telling him he can't wear campaign buttons. No one is telling him that he can't wear an American flag. No one is telling him that he can't give a political speech. He can do all of these things and he can do them clothed if he wants to. No one is telling him that he can't do any of those things.

Now the question is did he have to be nude in order to do those. The answer is no, he didn't have to be.

So how is it so interconnected that it is part of the freedom of speech and I don't believe it is interconnected. I don't believe that he would have been able to perform his play even if it had not been canceled and that would have been constitutionally acceptable. Just because, you know, if he's out in public and he decides to remove his clothing and he's told you're not allowed to do that and we're going to arrest you, you know, just because he decides I'm going to hold up a campaign sign or I'm going to wear an arm band or I'm going to dance a jig or I'm going to perform a play. That doesn't somehow take this out of realm of the ordinance. This is very different than the cases which allow dancing in a licensed establishment or a play to be performed like Ole Calcutta or something like that. You know, in an establishment that allows that type of activity. I am going to deny the Motion for Judgment of Acquittal, and I'm also going to find that Mr. Moll is guilty of violating the ordinance. Is there any legal reason why he shouldn't be sentenced at this time?

MR. CURRY: No, Your Honor, although I was going to make comments briefly.

APPENDIX C

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

APPEAL CASE NO.
96-19352-ACA

JOHN H. MOLL, III,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
----------/

Decision filed:

Appeal from Brevard County Court,
Kenneth Friedland, Judge.

Ellis Rex Curry, IV, Esq.
Attorney for Appellant.

Mchelle Jackson, Esq.
Attorney for Appellee.

PER CURIUM.
Affirmed.

JACOBUS, Bruce W., HOLCOMB, Charles M.,
JOHNSTON, Lawrence V.,
Judges, concur.

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

JOHN HUBERT MOLL, III,
Petitioner,

v. Case No. 97-2395

STATE OF FLORIDA,
Respondent.
---/

DATE: February 9, 1998

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION FOR REHEARING, FOR REHEARING EN BANC OR TO CERTIFY QUESTION, filed December 26, 1997, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.
/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

CC: Ellis Rexwood Curry, IV, Esq.
Hon. Bruce W. Jacobus
Hon. Lawrence V. Johnston, III
Office of the Attorney General, Daytona Beach
Hon. Charles Holcomb

APPENDIX E

BREVARD COUNTY ORDINANCE 95-21

AN ORDINANCE PROHIBITING PUBLIC NUDITY IN BREVARD COUNTY, FLORIDA; DESIGNATING A TITLE; EXPRESSING THE INTENT; SETTING FORTH FINDINGS, PROVIDING DEFINITIONS; CREATING EXEMPTIONS; PROVIDING FOR AN AREA EMBRACED; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA.

Section 1. Title. This ordinance shall be known as the "Brevard County Public Nudity Ordinance."

Section 2. Intent. It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Section 3. Findings.

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in

a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So.2d 1155, 1156, n.3 [Fla. 19771; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are unable to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on ail portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons,, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami], and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart for nudity has been found, by other communities in Florida, to have generally increased incidents of prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

M. Brevard County is a family oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular Playalinda beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the. United States Constitution and Florida Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public

places which are not public places provided or set apart for nudity within the Brevard County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities, and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this Ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre. Inc. 111 S.Ct 2456, 115 L. Ed.2d 504 [19911); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. Definitions.

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose, the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) Years of age.

d. "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended or sleeping accommodations; or at the enclosed or isolated location of a

bona fide private club whose membership as a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public Place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. Public Nudity. Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or
b. cause or permit another person to appear nude in a public place; or
c. sunbathe nude in a public place; or
d. appear nude in a public place in such a manner as to be in violation if §877.03, Florida Statutes; or
e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by §775,01, Florida Statutes.

Section 6. Exemptions. The offense of public nudity contrary to Section 5 above. shall not be deemed to have occurred in any of the following instances:
a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or
b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., _ U.S. _ , 111 S.Ct. 2456, 115 L. Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So.2d 891 [Fla. 1971]); or
c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions, or
d. where a person appears nude in any area which has

been designated, by the Federal or State government as a public place provided or set apart for nudity; or

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. Violation of Section 5/Penalty. Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1) Florida Statutes.

Section 8. Severability. If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate purpose and intent of this ordinance.

Section 9. Area Embraced. This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Section 10. Effective Date. This ordinance shall take effect upon the date of receipt of official acknowledgment from the office of the Secretary of State of the State of Florida, that said ordinance has been filed with that office.

Supreme Court, U.S.
FILED
JUN 24 1998
OFFICE OF THE CLERK

No. 97-1904

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN HUBERT MOLL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Brevard County, Florida

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CONCLUSION 8

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Ordinances

Ordinance 95-21, Code of Ordinances of Brevard County, Florida 1, 3, 5, 7

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, Brevard County, respectfully files it Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner Moll in this case as follows:

OPINIONS BELOW

The County accepts as accurate the matters set forth under this subtitle in Moll's petition.

JURISDICTION TO REVIEW

As discussed below, the reasons for review specified in the Petition fail to meet the criteria for the Court to exercise its certiorari discretion as specified in Rule 10(a), (b) and (c), Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of Brevard County Ordinance 95-21 quoted by the Petitioner, the following findings incorporated into the ordinance are relevant:

Section 3. c. through h. provide as follows:

> "c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably

avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons, including children, who chose not to appear nude in public places; and . . .".

STATEMENT OF THE CASE

Brevard County accepts the accuracy of Petitioner's statement of the procedural history of the case. The County also accepts the accuracy of the facts recited by the Petitioner, with the exception of the assertion, at page 4, that ". . . the state produced no evidence that he did anything that would have removed the protection afforded him by the ordinance's exemptions. . ." That statement assumes that Moll's actions qualified for exemption under the County ordinance. As will be pointed out, that assumption is incorrect. In addition, although an inference of Moll's nudity at the time of his arrest can be drawn from the Petitioner's statement of facts, the County asserts that Moll was nude, as defined by the County's ordinance, at a public beach when he was arrested.

ARGUMENT FOR DENYING THE PETITION:

THE PETITIONER'S ACTIONS DID NOT FALL WITHIN ANY EXEMPTION SET FORTH IN THE COUNTY ORDINANCE AND THE LOWER COURT'S RULING IS CONSISTENT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

Moll argues that his nude appearance on a public beach while "wearing an expressive outfit of his own choice which included a 'Vote for Clinton/Gore '96' sign"[1] qualifies for an exemption under either section 6.b. or 6.c. of the County ordinance. However, each of those provisions in the ordinance applies only "when the conduct of being nude cannot constitutionally be prohibited by this ordinance. . ." Moll's argument fails because his conduct in appearing nude on a

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[1]Petitioner's Brief at page 3.

public beach *can* constitutionally be prohibited under the precedent established by this honorable Court.

Local governments may prohibit public nudity whether or not it is combined with expressive activity otherwise protected by the First Amendment. *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 115 L. Ed.2d 504, 111 S. Ct. 2456 (1991). In *Barnes*, a plurality decision, the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed.2d 672, 88 S. Ct. 1673 (1967), was the common denominator among the justices voting to uphold the Indiana statute prohibiting public nudity as applied to nude dancing. The court, at page 512, stated:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The court found that regulating nudity in a public adult entertainment environment was not a violation of the First Amendment because (1) the legislation at issue was within the constitutional power of the government; (2) the legislation furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms was no greater than essential to the furtherance of the governmental interest.

In *State v. Davis*, Case Nos. 95-26139 COA and 95-25568 COA (Fla. Brevard Cty. Ct. Jul. 17, 1996),[2] Judge Philip

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[2]Judge Fougerousse's ruling was affirmed *per curiam* by a three judge circuit court appellate panel in *Davis v. State*, Case No. 96-19741-ACA (Fla. 18th Cir. Ct. Sept. 11, 1997) (attached as

Fougerousse applied the *O'Brien* test and upheld the Brevard County ordinance as applied to facts nearly identical to those at bar, where the Defendant Davis was arrested for standing on a public right-of-way topless with protest messages painted on her body. The County Court's order (copy attached as Appendix Exhibit "A") analyzed the Brevard County ordinance under the four-part *O'Brien* test and made specific findings, to-wit: that the ordinance was enacted within the constitutional authority of the County and its police powers, that it furthers important or substantial governmental interests, that the government interest is not related to the suppression of free expression, and that the incidental restrictions on the First Amendment freedoms of the defendant are no greater than essential to the furtherance of the governmental interests. Accordingly, the court held that the ordinance was valid.

Judge Fougerousse then considered the defendant's contention that, the First Amendment exempted her from the prohibition against public nudity because her topless appearance on a public right-of-way was accompanied by political speech in the form of a protest message painted on her body. Citing to *Adderley v. State*, 385 U.S. 39, 17 L. Ed.2d 149, 87 S. Ct. 242, *reh. den.*, 385 U.S. 1020, 17 L. Ed.2d 559, 87 S. Ct. 698 (1966), the trial court rejected that argument. In *Adderley*, the defendants were convicted of trespassing in connection with a protest at a jail site. The protesters claimed that they had selected a specific area outside the jail to conduct a civil rights protest and that as long as they were peacefully demonstrating in that area, the State had no right to enforce trespass laws against them. In affirming the convictions, the court stated,

> ". . . [S]uch an argument has as its unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and

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Appendix Exhibit "B").

> however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on . . . We reject it again." [citations omitted].

Adderley, 385 U.S. at 47-48. *See also, Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 92 L. Ed 2d 568, 106 S. Ct. 3172 (1986).

Likewise, in the case at bar, Mr. Moll would have a First Amendment right to make his views known and to verbally express them in any public forum, however, in view of the county ordinance prohibiting public nudity, he cannot express those views in public while nude. Just as the First Amendment provided no exemption from prosecution to the defendants in *Adderley* when they protested while violating trespass laws, the fact that Moll was expressing a political message does cloak him with First Amendment protection while violating the ordinance prohibiting public nudity.

In a similar case, *Shetler v. State*, 681 So. 2d 730 (Fla. 2d DCA 1996), Florida's Second District Court of Appeal upheld the conviction of a hotdog vendor arrested for wearing a T-back bathing suit in violation of the Polk County anti-nudity ordinance. The court rejected defendant's First Amendment claim, found that her conduct was fit for government regulation and that First Amendment protection was minimal. Further, the court held that the county's interest in protecting and preserving the health, safety, welfare, and morals of its citizens would justify any intrusion upon constitutionally protected expression.

Because the County's ordinance is valid under the *O'Brien* test and public nudity in violation of that ordinance, even where accompanied by speech, can be constitutionally prohibited under the principles espoused in *Adderley* and *Shetler*, Moll's reliance on *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981) is unavailing. In *Schad*, the municipal zoning ordinance prohibited all live entertainment within the city, including live nude entertainment. This Court

found that the Mount Ephraim ordinance contained no justification for such a broad limitation on protected expression.

In contrast, the public nudity prohibition adopted by the Brevard County Commission sets forth specific findings of fact in section 3.c through 3.h of the ordinance which recite, among other justifications, that the ordinance was justified because of the deviant sexual conduct and open displays of public nudity in front of children that proliferated on public beaches after a federal district court ruled that nudity, absent proof of lewd and lascivious conduct, could not be prosecuted under state criminal laws prohibiting public nudity . The Brevard County ordinance is therefore distinguishable from the zoning ordinance invalidated in *Schad*[3] where justification for the adoption of the Mount Ephraim ordinance was entirely lacking.

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[3]Notably, an ordinance which served as a model for the Brevard County ordinance, containing similar findings and provisions, withstood the *O'Brien* analysis in *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), *affirmed*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1544, 134 L. Ed.2d 647 (1996). The district court found that "The law (i.e., the ordinance) as an exercise of the county's police power, is clearly within its constitutional authority." The court found that the ordinance served several substantial and important governmental interests, including the protection of order and morality, as well as the interest in combating the secondary effects of nudity. The court also held that those governmental interests were not related to the suppression of free speech as such. Finally, the district court reviewed whether the incidental restriction on alleged First Amendment freedoms was no greater than essential to the furtherance of the governmental interests served by the ordinance. The court then concluded that the St. Johns County ordinance passed all four parts of the *O'Brien/Barnes* test and was therefore constitutional.

CONCLUSION

Since the decision of the lower court is consistent with prior decisions of this Court, the Petition should be denied.

Respectfully submitted,

OFFICE OF THE BREVARD COUNTY ATTORNEY
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By _____
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Brevard County Attorney
Florida Bar No. 211291

ATTORNEY FOR *AMICUS CURIAE*
BREVARD COUNTY, FLORIDA

APPENDIX EXHIBIT "A"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 95-26139-MMA
95-25568-MMA

STATE OF FLORIDA

Plaintiff

vs.

KRISTINA DAWN DAVIS

Defendant

_____/

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

THIS CAUSE having come on to be heard on the Defendant's Motions to Dismiss Information in the above styled causes of action and that the Court having heard arguments of counsel on several occasions and further having been provided and taking into consideration the Defendant's Memorandum of Law dated June 3, 1996 along with the Memorandum of Law in Opposition to Defendant's Motion to Dismiss provided by the State on June 3, 1996 with Notice of Supplemental Authority filed by the State on June 6, 1996 and the Court being otherwise fully advised in the premises does hereby find the following:

The Defendant in filing her Motion to Dismiss has raised constitutional issues alleging the unconstitutionality of

County Ordinance 95-21 as it relates to these causes of action. Specifically, the Defendant has raised first amendment issues including free speech, the right to protest and overbreath, has also raised a due process issue of vagueness in said ordinance along with two issues pertaining to the Defendant's right to equal protection and finally, an issue related to selective enforcement. In the Defendant's Memorandum of Law the Defendant has conceded the issue of selective enforcement and for current purposes waives that issue. The Defendant has further waived the issues of overbreath and vagueness. These issues, having been waived and will not be considered by this Court at this time.

The facts of this case are as follows:

On October 24, 1995 the Defendant was allegedly standing on the side of a public roadway located in Brevard County, Florida in a thong bikini bottom wearing only pasties over the areola and nipples of her breasts, the remaining portions of her breasts not being covered (Case No. 95-25568-MMA). On November 6, 1995 the Defendant was standing in the same area of a public roadway located in Brevard County, Florida wearing only a thong bikini bottom with no covering of any portion of her breasts. On her body were written and/or drawn sentiments against Brevard County Ordinance 95-21 which Ordinance is being herein challenged by the Defendant.

FIRST AMENDMENT

The first issue is weather [sic] the Defendant's conduct in exposing her breasts in protest of Ordinance 95-21 is protected speech and conduct under the First Amendment of the United States Constitution and Article I, Sections 4 and 5 of the Florida Constitution. The Defendant alleges that she was engaged in a political protest on November 6, 1995 when she was arrested for being in violation of said Ordinance.

Nudity in and of itself is not a constitutionally protected activity. McGuire v. State, 489 So. 2d 729 (Fla. 1986). "[P]ublic nudity does not convey any specific message, at most it is a medium by which a variety of messages may be

conveyed. The medium of nudity is not a particular message, the medium is simply the medium." Craft v. Hodel, 683 F.Supp. 289, 292 (D. Mass. 1988). Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection. South Florida Free Beaches v. City of Miami, Florida, 734 F. 2d 608 (11th Cir. 1984).

In O'Brien v. United States, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), the Supreme Court has enunciated a test for determining the constitutionality of restrictions on symbolic speech or expressive conduct.

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 319 U.S. at 376, 377.

O'Brien has been used to uphold an anti-nudity Ordinance from St. Johns County, Florida. Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641 (M.D. Fla. 1994), affirmed 66 F.3d 273 (11th Cir. 1995), cert. den. April 22, 1996. In Cafe 207, the owner and dancers of an adult entertainment establishment challenged St. Johns County's anti-nudity ordinance. One of the bases of the challenge was that the act of nude dancing is expressive conduct or symbolic speech and

protected by the First Amendment against such an ordinance. The Court applying O'Brien found quickly that the first three elements of the test were met:

> The law, as an exercise of the County's police power, is clearly within its constitutional authority. It also serves a substantial and important governmental interest in protecting order and morality and in combating the secondary effects of nudity in adult entertainment establishments of the sort typified by the Plaintiff's Cafe Erotica. And, neither of those governmental interests is related to the suppression of free expression as such. Cafe 207 at 644.

The Court concluded that the incidental restriction on the First Amendment freedoms was no greater than was essential to the furtherance of the governmental interests served by the ordinance. The Court acknowledged that there was "a line in every case beyond which the lawmakers cannot go in requiring clothing or prohibiting exposure in some contexts" but that the St. Johns ordinance did not cross that line. Cafe 207 at 646.

It is this Court[']s ruling in applying the O'Brien test to Brevard County Ordinance 95-21 that:

1. The ordinance was enacted within the constitutional authority of the county and its police powers.

2. The ordinance furthers important or substantial governmental interests in protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates; and to protect and preserve the health, safety and welfare of people of Brevard County.

3. The governmental interest is not related to the suppression of free expression.

4. The incidental restriction on the First Amendment freedoms of the Defendant in this case are no

greater than essential to the furtherance of governmental interests.

This Court rules that the conduct of the Defendant in this case, appearing nude from the waist up, to protest is not entitled to protection under the First Amendment.

The Defendant argues that because this was a political protest, the conduct of appearing nude in public should not be abridged. In Adderley v. State, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242, the Supreme Court held that convictions for trespass did not unconstitutionally deprive defendants of their rights to freedom of speech, press, assembly, or petition. The defendants in this case were protesting the arrest of other protesters and segregation. The protest was at the local jail in the driveway near the jail entrance. The defendant had argued that they had a constitutional right to stay on the property because the "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . ." Adderley, at 47. In response to this argument, the Court states:

> Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected.. . .We reject it again.

It is this Court[']s ruling that the Defendant in this case does not have the unrestricted right to do as she pleases, where she pleases in the name political protest.

EQUAL PROTECTION

The Second major issue which is addressed by the parties in this case is Equal Protection. The Defendant contends that Brevard County Ordinance 95-21 is unconstitutional on its

face by creating two separate classifications which will be addressed independently.

Male v. Female

Gender based classifications are tested by an intermediate scrutiny test, whether the classification bears a substantial relationship to important governmental objectives. Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451 (1976). (See United States v. Biocic, 928 F.2d 112 (4th Cir. 1991); Eckel v. Davis, 51 Cal.App.3d 831, 124 Cal.Rptr. 685 (1975).

It is the defendant's position that these cases which have held that the classification between the male and the female breast is not a violation of equal protection have been based upon the:

> [I]mplicit. . .reasoning of all of these decisions is the underlying assumption that the female breast is sufficiently different from the male breast to justify the different standard applied to the public expose [sic] of each type of breast. However, it is also absolutely evident from the cases that this distinction takes on constitutional meaning only because of the courts' acceptance that traditional concepts of morality and concepts of public decency buttress the distinction. Without the moral/decency nexus there would be no rational basis to distinguish between the public exposure of either type of breast. Defendant's Memorandum of Law p. 13.

It is argued that there is no longer the support for the gender bases [sic] classifications. That societal views of women and concepts of public morality and decency have changed rendering these classifications and unconstitutional denial of equal protection. That argument is hereby rejected by this Court. In rejecting the above argument, the Court further

rejects the ruling in People v. David, 585 N.Y.S.2d 149 (N.Y. 1991) wherein said Court found that "male and female breasts are physiologically similar except for lactation capability." David at 68.

Female v. Female breast feeding

The second classification which the Defendant challenges is the allowance in Brevard County Ordinance 95-21 for exposure of a female's breast in conjunction with breast feeding. The Defendant claims that in one instance the act of exposing a breast is criminalized but in another it is not.

A rational basis test would be applicable to an equal protection analysis as to this type of classification which does not involve a fundamental or constitutionally protected right. Does the ordinance bear a rational relationship to a legitimate governmental purpose?

The exemption for the exposure of a breast of a female breast feeding a child from the ordinance is in deference to Section 383.015, Fla. Stat. (1995) which allows for breast feeding in public.

The Defendant in this case contends that the exposure of the breast is the same and that the basis for not allowing the exposure still remains, that the exposure is morally offensive. And given the legislative approval of breast feeding in public, there is no longer a legitimate governmental interest in the distinction (i.e. the changing societal views and morality).

The State's position is that the intentional exposure of a breast is not the same as the exposure of a breast while breast feeding and that the legislature has considered the policy behind allowing breast feeding. It asks that the Court acknowledge that the classification is reasonable and that anything further by the court would be an "inappropriate infusion of judicial will upon the legislative body." Memorandum of Law in opposition to Defendant's Motion to Dismiss p. 14.

There appears to be no case law addressing the breast feeding aspect at applied to a nudity ordinance or statute. It is then left to this Court to make a determination as to whether Brevard County Ordinance 95-21 bears a rational relationship

to a legitimate governmental purpose. This Court finds that the rational basis for this classification would be that the legislature has considered the merits to allowing breast feeding (nurturing and health of child, family values, etc.) and weighed them against the moral values of society and believed that breast feeding was a greater interest and that the offensiveness of exposing the breast was incidental to this interest, thereby carving out an exception for breast feeding.

Based upon the foregoing analysis it is hereby ORDERED and ADJUDGED that the Defendant's Motion's [sic] to Dismiss Information in case numbers 95-25568-MMA and 95-26139-MMA are hereby denied.

DONE and ORDERED in Melbourne, Brevard County, Florida, this 17th day of July, 1996.

//s// Philip Fougerousse
PHILIP FOUGEROUSSE
County Court Judge

APPENDIX EXHIBIT "B"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 96-19741-ACA

KRISTINA DAWN DAVIS,
Appellant,

vs.

STATE OF FLORIDA
Appellee.
_____/

Decision filed:

Appeal from Brevard County Court

Burton J. Green, Esq.
Attorney for Appellant

Michelle E. Jackson, Esq.
Assistant State Attorney
Attorney for Appellee

PER CURIAM.

This case is the result of an appeal from two lower criminal cases where the Appellant was charged with violations of Brevard County Ordinance 95-21 which prohibits appearing nude in a public place. The Appellant moved to dismiss both cases on Equal Protection and First Amendment grounds. The motions were denied by the trial court. The Appellant then pled

nolo contendere specifically reserving her right to appeal the denial of her motions to dismiss. This Court has jurisdiction.[1]

The Appellant is a hot-dog vendor operating a hot-dog cart by the side of the road. On one occasion she proceeded to sell hot-dogs wearing only a thong bikini bottom and pasties on her breasts. This is one of the two cases consolidated on appeal. On another occasion, the Appellant protested the anti-nudity ordinance, 95-21, by wearing only a thong bikini bottom and no top such that her breasts had no covering while standing and waiving at the side of the road. On her body, including her breasts, she had protest writings directly on her skin. In addition, she carried a sign of protest. In both cases she was arrested for violating the county anti-nudity ordinance. The Appellant argues that the exposure of her breasts as an act of political protest was constitutionally protected conduct under the First Amendment. The Appellant further argues that the anti-nudity ordinance violates equal protection both as applied to the male gender and as applied to nursing females who may legally expose a breast while feeding a child.

The Appellant does not dispute that she violated Ordinance 95-21. Rather she argues that her constitutional rights as presented outweigh any requirement to adhere to this ordinance. We disagree. Ruling only on the facts before this Court, we hold that the Appellant was not entitled "constitutionally" to violate the ordinance as part of her protest against the ordinance. First, the ordinance clearly withstands scrutiny under the four part test enunciated in United States v. O'Brien, 391 U.S. 367, 20 L.Ed2d 672, 88 S.Ct. 1673 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

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[1]Rule 9.030(c)(1)(A), Fla. R. App. P.

> suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S., 367 and 376.

In O'Brien the Court reiterated it's position that when "speech" and "nonspeech" elements are combined in the same course of conduct, an incidental limitation on First Amendment freedoms is justified if there is a "sufficiently important governmental interest" in regulating the "nonspeech" element. Id. See also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991); Cafe 207, Inc. v. St. Johns County, 66 F.2d 272 (11th Cir. 1995) (affirming the district court at 856 F.Supp. 641 (M.D. Fla. 1994)).

In Adderley v. State of Florida, 385 U.S. 39, 46, 17 L.Ed.2d 149, 87 S.Ct. 242, 246 (1966) the Court reaffirmed it's position against the view that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." In that case the Court held that protesters did not have the contitutional [sic] protection to trespass on the property of the county jail in a protest against prior arrests made on fellow college students.

Therefore the Appellant did not have the inherent right to break the very ordinance that she has a First Amendment right to protest. She could very well have demonstrated against and protested the ordinance by standing along side of the road with protest signs or posters without exposing her breast to the public. Based upon this holding, this Court does not address the merits of the Appellant's Equal Protection arguments.

The trial court is AFFIRMED.

JACOBUS, Bruce W., and HOLCOMB, Charles M., JJ concur.
JOHNSTON, Lawrence V., specially concurs with opinion.

Johnston, Lawrence V., concurring.

Apparently nudity bothers some people.

The Brevard County Sheriff's Office arrested the Appellant on October 24, 1995 for appearing in public (selling hotdogs) on the side of U.S. Highway 1. On that date and at that location, she wore less clothing than required to keep from violating Brevard County Ordinance 95-21.

The cost of prosecution and appeal of this particular incident surely must outweigh the benefit to the fair citizens of Brevard in the short run. In the long run, it is the price we pay to contain members of our society within some moral or cultural boundary. Sadly, some people must need them. On one side of the boundary are the people who want things as they were, i.e., covered. On the other side of the boundary are the people who annoy the others. "Common decency" and "propriety" are not concepts given to universal understanding. It is only a shame that the boundary cannot be drawn in such a manner that all citizens in our community cannot agree to stand on the same side of it. Living in our society and running government is not a game. There should be no need to waste tax money on these endless battles.

The second part of this case deals with the Appellant's arrest on November 5. It is for this incident which I find no legal support of the Appellant's position. I find only a manipulative intent to lower the dignity of the concepts of freedom of speech and equal protection and to obtain publicity. Squandering our constitutional rights for commercial benefit is ill-advised. There are more worthy projects for our citizens, our lawyers and our judges.